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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

HOWARD HERSHIPS, Plaintiff and Appellant, v. MANNINGTON MILLS, INC. et al., Defendant and Respondent.	A094839 (San Francisco County Super. Ct. No. 995491)

INTRODUCTION

Plaintiff Howard Herships appeals in propria persona from a judgment of the San Francisco Superior Court, following the trial court's grant of summary judgment in favor of defendant and respondent Mannington Mills, Inc. upon appellant's personal injury action against respondent. Appellant contends reversal of summary judgment is required because: (1) the court abused its discretion by denying his request to continue the summary judgment motion to allow him to complete discovery; (2) respondent's expert physically inspected the premises without notice to appellant; and (3) appellant was denied due process of law under the Fourteenth Amendment to the United States Constitution where the court allowed respondent to proceed on the summary judgment motion without affording him the opportunity to depose respondent's expert witness. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 1999, appellant filed a first amended complaint seeking recovery for damages he suffered when he slipped on the wet floor when exiting the shower room

of the Folsom Street Hotel on or about February 4, 1998. Appellant sued the hotel, its owner, and respondent Mannington Mills, Inc., the manufacturer of the sheet vinyl floor covering used on the floor. Respondent filed an answer to the amended complaint on January 28, 2000 and at the same time filed a cross-complaint for indemnity against the hotel and its owner. Trial was set for January 2, 2001.

On November 3, 2000, respondent filed a notice of motion and motion for summary judgment seeking entry of judgment in its favor and against appellant, to be heard December 1, 2000. Exhibits to the motion included the declarations of John Ryan, district manager for respondent, Milo Bell, a licensed mechanical engineer and expert in safety engineering and testing, and a copy of a document detailing the results of testing of the Mannington Mills sheet vinyl flooring tests performed on the type of vinyl flooring used in the hotel. Ryan declared he had inspected the floor where appellant allegedly fell and identified it as a Mannington Mills vinyl floor product called Monarch Blue, Model No. 90005, sold for residential applications in kitchens, bathrooms, and washrooms. Bell declared that he had "reviewed the results of the coefficient of friction testing of the Mannington Mills sheet vinyl flooring (Model No. 90005) at issue in this case, indicating test results for the flooring both wet and dry, and using a variety of shoe sole surfaces." "The coefficient of friction values shown for the various tests performed all meet or exceed accepted industry safety standards, and in my expert opinion the Mannington Mills flooring is safe, and not unreasonably slippery or dangerous." Attached to and identified in the Bell declaration, was the document reporting the coefficient friction testing and its results. Respondent also submitted a declaration from the testing company verifying that the report was a true copy of that prepared by the company based on the testing of that model floor.

Respondent sought summary judgment on the grounds that discovery had confirmed appellant "has no admissible evidence with which to support his claim that the Mannington flooring was defective" either in design or manufacture.

Based upon these declarations, respondent submitted its statement of undisputed material facts as follows: "1. The vinyl floor that plaintiff slipped on was a Mannington

floor, Model No. 90005." and "2. The Mannington floor Model No. 90005 was tested for its slip resistance and was proven safe under current industry standards."

On November 17, 2000, appellant filed points and authorities in opposition to the summary judgment motion. Therein he argued that the doctrine of strict product liability required that summary judgment be denied and also sought a continuance "as plaintiff has retained his Expert Witness and needs more time to obtain a Declaration to show triable issues." In his declaration supporting an extension of time to complete discovery pursuant to Code of Civil Procedure section 437c, subdivision (h), appellant declared that he was never served with any notice of any inspection of the premises by the expert witness, that he had never been served with reports of the expert witness or given notice of the designation of the expert witness so that he could take the expert witness's deposition and "That as such, I am unable to file a proper response to the Motion for Summary Judgment as I am unable to complete expert witness discovery. [¶] . . . That I have just retained my Expert Witness in this case and I have been unable to obtain access to the premises for my expert witness to review the vinyl floor covering and obtain a Declaration to file in Opposition to the Motion for Summary Judgment."

On December 1, 2000, the court held a hearing on the summary judgment motion. At the hearing, the court stated that it was denying appellant's request for a continuance because it did not comply with the requirements of Code of Civil Procedure section 437c, subdivision (h).[1] Appellant argued that respondent had failed to disclose its expert witness or give appellant the opportunity to depose the expert. Counsel for respondent replied that she had complied with the rules throughout the litigation and pointed out that appellant had failed to disclose any expert, but was "going in next week seeking relief to disclose an expert beyond the [statutory] time frame." The court denied the motion for a

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1 The court explained: "You didn't advise us exactly what it is you're going to get in the discovery. And all I could tell from this is you were going to get some expert who was supposedly sort of like an inspector and the inspector was going to go to the hotel and the inspector might look at the floor and say -- and come up with some conclusion as it being a slippery floor."

continuance and granted the motion for summary judgment.[2] A judgment dismissing the action as to respondent was filed on April 13, 2001. This timely appeal followed.

DISCUSSION

A. The trial court did not abuse its discretion in denying appellant's request for a continuance of the summary judgment hearing.

Code of Civil Procedure section 437c, subdivision (h)[3] provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

This provision, which has been described as "making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated '"upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.' [Citation.]" (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 385) was included by the drafters of the statute to mitigate the harshness of summary judgment, which deprives the losing party of a trial on the merits. (*Id.* at pp. 394-385.)

Appellant emphasizes the language of the cases indicating the continuance is "virtually mandated" and skates over the specific showing which must be made to warrant a continuance. Although such continuances are to be liberally granted (*id.* at p. 395), only "*by making* a *declaration meeting the requirements of section 437c, subdivision (h)*" (*id.*, italics added) may an opposing party "'compel a continuance of a summary judgment motion.'" (*Id., quoting Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 770.)

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2 The court also sustained respondent's objections to appellant's evidence. The record before us does not contain information indicating what objections were sustained or to what evidence they related.

3 Statutory references are to the Code of Civil Procedure, unless otherwise indicated.

"The purpose of the declarations required by section 437c(h) is to inform the court of outstanding discovery necessary to resist the summary judgment motion: 'To be entitled to a continuance, the party opposing the motion for summary judgment must show that its proposed discovery would have led to facts *essential* to justify opposition.' [*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325-326 . . . (emphasis added; internal quotes omitted)—declaration *not* excused by outstanding discovery order requiring production of documents sought]." (Weil & Brown, Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 10:207.2a (hereafter Weil & Brown).)

Diligence of the party seeking the continuance is a factor in evaluating the request. (E.g., *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548*; A&B Painting and Drywall, Inc. v. Superior Court (Bohannon Development Co.)* (1994) 25 Cal.App.4th 349, 356-357 [continuance unwarranted where party opposing summary judgment did not explain what efforts had been made to take necessary depositions or why they could not have been taken earlier]; *Tokai Bank of California v. First Pacific Bank* (1986) 186 Cal.App.3d 1664, 1669; Weil & Brown, Civil Procedure Before Trial, *supra,* ¶ 10:69.)

Some courts have questioned whether lack of diligence *alone* will justify denial of a continuance request which meets the requisites of section 437c, subdivision (h). (*Bahl v. Bank of America, supra,* 89 Cal.App.4th at p, 397 ["We question whether diligence alone should make or break a continuance request under Code of Civil Procedure section 437c, subdivision (h). The issue of discovery diligence is not mentioned in section 437c, subdivision (h), which raises obvious doubts about its relevance."]; cf., *Mary Morgan, Inc. v. Melzark, supra,* 49 Cal.App.4th at pp. 770-771.)

However, even those courts unwilling to condition the continuance of a summary judgment motion upon a showing of due diligence acknowledge that: "When lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion. [Citations.]" (*Bahl v. Bank of America, supra,* at p. 397.)

We agree with respondent that appellant's declaration did not meet the statutory requisites for a continuance as it neither showed that facts essential to justify opposition might exist nor explained adequately why such facts could not be presented at the time.

Appellant's declaration stated only that he had recently retained his expert witness, had been unable to access the premises, and had not been noticed of respondent's inspection of the premises. Clearly there appears to have been a lack of diligence on appellant's part. More importantly, as recognized by the trial court, none of these factual statements in the declaration indicated that facts essential to justify opposition might exist. Nor did appellant adequately explain why such essential facts could not have been presented at the summary judgment hearing.

Like the plaintiff in *Roth v. Rhodes, supra,* 25 Cal.App.4th 530 (*Roth*), appellant here presented the court with a declaration in which he "claimed he needed time to conduct further discovery and interview his expert witness." (*Id.* at p. 547.) Among the factors which led the appellate court in *Roth* to affirm the trial court's denial of a continuance were: that the case was close to trial, at the time of the motion it had been pending for two and one-half years, and no reason was given for the lateness of the request. "Finally, the declaration failed to satisfy the requirements of Code of Civil Procedure section 437c, subdivision (h). *It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.'* The declaration indicates two depositions remained to be completed and [the plaintiff] had not yet received his expert opinions. However, there is no statement which suggests what facts might exist to support the opposition to the motions. The trial court was fully justified in finding the declaration insufficient to support a continuance." (*Id.* at p. 548, italics added.)

Roth, supra, 25 Cal.App.4th 530, appears to us to be on point. *St. Mary Medical Center v. Superior Court (Mennella)* (1996) 50 Cal.App.4th 1531 and *Bahl v. Bank of America, supra,* 89 Cal.App.4th 389, upon which appellant relies, are distinguishable.

In *St. Mary Medical Center v. Superior Court (Mennella), supra,* 50 Cal.App.4th 1531 the issue was whether the trial court abused its discretion in denying the defendants' request to depose plaintiff's expert where defendants had moved for summary judgment and plaintiffs had presented their expert's declaration to oppose the summary judgment motion. In that medical malpractice action, the plaintiffs relied upon the declaration of their expert doctor to establish a triable issue of fact as to the negligence of two defendant doctors. Plaintiffs sought to depose the defendant's doctor, explaining in their declarations that they had reservations about the foundation of the opinions expressed in opposition to their summary judgment motion, as the plaintiff's expert wrongly assumed one of the defendant doctors to have been involved in the medical procedure leading to this claim. In addition, the defendants' expert had reviewed the plaintiff's expert's declaration and found the bases for plaintiff's expert's conclusions to be untenable. The appellate court issued a writ of mandate directing the trial court to set aside its order denying the deposition, and to allow the deposition limited to foundational issues related to the opinions rendered in the declaration in opposition to the summary judgment motion. The appellate court concluded that "where a party presents evidence that raises a significant question relating to the foundation of an expert's opinion filed in support of or in opposition to a motion for summary judgment or summary adjudication, a deposition limited to that subject should be allowed." (*Id.* at p. 1534.) The court recognized, however, that "*it would defeat the purpose of the summary procedure were we to recognize an absolute right of a party involved in the process to depose any person who provides evidence in support of or opposition to the proceeding.* On the reverse side of the coin, it would defeat the concept of a summary procedure if the opposition party were to be allowed to defeat the motion by less than candid declarations or affidavits in opposition." (*Id.* at p. 1538, italics added.) "For that reason, we believe that under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question

regarding the foundation of the opinion of the expert. We believe that is the situation presented in this case." (*Id.* at p. 1540.)

The situation presented here is quite different. Appellant's declaration contains no information raising any question relating to the foundation of respondents' expert's opinions. Indeed, appellant had not yet consulted his own expert.

In *Bahl v. Bank of America, supra,* 89 Cal.App.4th 389, the plaintiff sought to recover for defendant Bank's wrongful appropriation of her idea for imprinting checks. The plaintiff requested a continuance of the defendant's summary judgment motion because discovery was still ongoing; e.g. transcripts of depositions essential to justify opposition had not yet been received from the court reporter and the defendant had produced over 600 pages of documentation after the plaintiff had filed her opposition. (*Id.* at p. 392.) Plaintiff's counsel submitted affidavits that a key witness's deposition testimony conflicted with statements he made in his declaration in support of summary judgment and that counsel would not be receiving copies of the deposition transcript for another week. Counsel had just received the deposition transcripts of a second declarant in support of the defendant's motion, who was the person most knowledgeable about the critical timing of events, and counsel stated he needed more time to review that transcript. According to the court, "We are hard-pressed to imagine evidence more 'essential to justify opposition' than that which might undermine the weight or credibility of declarations made in support of a motion for summary judgment." (*Id.* at p. 396.) Moreover, when initial application for the continuance was filed, the plaintiff's counsel informed the court he had not received documentation regarding the plaintiff's idea and had demanded the production of documents regarding the history of the system of imprinting checks which underlay the plaintiff's claims. Counsel received hundreds of pages of this documentation from the defendant after filing the continuance request. These documents were critical to resolution of the plaintiff's stolen idea claim and the plaintiff was "entitled to a meaningful opportunity to review and evaluate the TAW system specifications and related documentation in order to oppose the summary judgment." (*Id.* at p. 396.)

Moreover, the question of whether the plaintiff had been dilatory in conducting discovery was subject to conflicting interpretations. The appellate court observed that "the delay in prosecution was at least partially justifiable, and it was not caused solely by plaintiff." (*Id.* at p. 396.)

Because the plaintiff had submitted declarations satisfying the statutory criteria by informing the court of outstanding discovery matters and why essential facts could not be presented at the time, and although plaintiff's "strategy might well be termed by some as both tactical and practical, and by others as lacking in diligence," the trial court abused its discretion in denying the request for a continuance. (*Id.* at p. 399.) Nevertheless, the court in *Bahl* agreed with *Roth* that a declaration was not sufficient where it merely indicated further discovery or investigation was contemplated. (*Id.* at p. 397.) It also acknowledged cases in other contexts in which courts have held the "mere indication of a desire to conduct further discovery to be insufficient to support a continuance as well." (*Ibid.*)

In the instant action, not only does it appear from the record that appellant was dilatory in retaining his own expert and in failing to conduct any discovery during the pendency of this action, but his declaration completely failed to meet the statutory criteria for obtaining a continuance. As summarized by Weil & Brown, to obtain a continuance, "the opposing party's declarations should show the following: [¶]—Facts establishing a likelihood that controverting evidence may exist; [¶]—The specific reasons why such evidence cannot be presented at the time; [¶]—An estimate of the time necessary to obtain such evidence; and [¶]—The steps or procedures which the opposing party intends to utilize to obtain such evidence. [Citations.]" (Weil & Brown, *supra*, ¶ 10:207.3.)

Appellant's declaration contains no *facts* establishing a likelihood (or even a reasonable chance) that controverting evidence may exist. The absence of this critical component dooms the balance of the declaration. Moreover, we are not persuaded that the late retention of an expert and the failure to secure an opinion from that expert at this

late date constitute sufficient "specific reasons why such evidence cannot be presented at this time."

In these circumstances the trial court did not abuse its discretion in denying appellant's request for a continuance of the summary judgment motion.

B. Respondent was not required to notify appellant of its premises inspection.

At the heart of appellant's remaining claims lies his assumption that he was entitled to notice of any premises inspection by respondents' witnesses and an opportunity to be present at such inspection.

Appellant has cited no authority that entitles him to either notice of or inclusion in such a site inspection, absent his having made any discovery demand. Instead, he relies upon language taken out of context from our opinion *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1288, as follows: "It is undeniable the [Civil] Discovery Act [(§ 2016 et seq.)] was intended to bring a new form of order to civil discovery and to eliminate some of the more undesirable elements of the adversarial system, including the 'sporting theory of litigation—namely surprise at trial.' [Citation.] Discovery simply tries to 'take the "game" element out of trial preparation while yet retaining the adversary nature of the trial itself.' [Citation.] In doing so, the Discovery Act as amended and interpreted has subsumed the entire field pertaining to the gathering of evidence in preparation for trial. The fact counsel still conduct much pretrial preparation and discovery without judicial assistance [citation] does not mean parties to litigation can operate outside the applicable parameters of the Discovery Act or may violate other laws or common law strictures in their zeal to pursue litigation."

Pillsbury, Madison & Sutro v. Schectman is factually distinguishable as there the plaintiff employer sued an attorney and law firm representing employees of the plaintiff in employment law claims, to recover documents removed from the plaintiff's office without plaintiff's consent. The trial court issued an order granting plaintiff a preliminary injunction requiring defendants to turn over the documents and we affirmed. The facts raised an issue within the trial court's inherent authority to administer the resolution of disputes, and its authority under the claim and delivery of personal property statutes (§§

511.010-516.050). The defendants presented no applicable policy exceptions to this authority.

Any doubts as to the permissibility of respondent's informal premises inspection are set to rest by *Pullin v. Superior Court (Vons Companies, Inc.)* (2000) 81 Cal.App.4th 1161 (*Pullin*). There, plaintiff brought a slip and fall action in which the defendant supermarket moved in limine to exclude testimony of the plaintiff's expert regarding the results of his investigation of the slipperiness of the supermarket floor. The expert had performed the tests without violating any laws, but also without resort to discovery procedures under the Civil Discovery Act and without notifying the defendant. The appellate court ruled that "there is nothing in the Civil Discovery Act (§ 2016 et seq.) to prevent a party from conducting a unilateral investigation without resort to any statutory discovery device, provided only that the investigation is lawful." (*Id.* at p. 1162.) Because we find it dispositive, we quote Justice Vogel's opinion in *Pullin* at length:

"As relevant, section 2031 provides that a "party *may* demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.' (§ 2031, subd. (a)(3), italics added.) In section 2031 as throughout the Discovery Act 'may' is quite obviously permissive. It means that a party who wants to can conduct discovery. If he doesn't want to, he doesn't have to. [Citation.] [¶] There is scant authority on the distinction between formal discovery and investigation, with everyone apparently assuming that everyone else knows the difference. [Citation.] Black's Law Dictionary defines 'investigate' this way: 'To inquire into (a matter) systematically. . . .' 'Discovery' is defined as '[c]ompulsory disclosure, at a party's request, of information that relates to the litigation. . . .' (Black's Law Dict. (7th ed. 1999) at pp. 478, 830.)" (*Pullin, supra,* at p. 1164.)

Pullin rejected the trial court's criticism of the inspection and test as "secretive," noting: "All unilateral investigation is by definition conducted outside the presence of the party's adversaries. There is nothing wrong with that. Had [plaintiff's expert] looked at the floor, identified the flooring material, gone out and purchased a piece, taken it to a laboratory and tested it, no one from Vons would have been present. As Vons' lawyer conceded at oral argument, he could have done just that. Clearly, the issue of 'secretiveness' is a red herring." (*Id.* at fn. 3.) The court continued: "We need no authority for the proposition that a party's request to the other party for answers to questions (depositions, interrogatories, requests for admissions) must be made in conformance with the Discovery Act. Similarly, it is clear that, in most instances, a party's right to inspect documents or other physical evidence in the possession or custody of the opposing party depends upon compliance with the procedures set out in section 2031. *On the other hand, there are situations where documents can be obtained without the other party's cooperation* (for example, under the Public Records Act or *from a friendly third party* or by hiring a trained investigator or on the internet). In the case now before us, the question is whether property open to the public can be examined without recourse to section 2031. Our answer is yes, provided that the examination can be conducted in a lawful fashion." (*Id.* at pp. 1164-1165, italics added.)

Respondent's "investigation" of the floor here was conducted in a lawful fashion, in cooperation with the owner of the building.[4] As did the court in *Pullin*, we conclude nothing in the Discovery Act prevented respondent from conducting its investigation without resort to a statutory discovery device.

Appellant argues, nevertheless, that section 2031, subdivision (c) requires that respondent notify him at least 30 days before any inspection.[5] He misinterprets that

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4 Indeed, it appears that the only premises investigation was to identify the flooring as a Mannington Mills vinyl floor product called Monarch Blue, Model No. 90005.

5 In relevant part, section 2031, subdivision (c) provides: "A party demanding an inspection shall number each set of demands consecutively. . . . Each demand in a set . . . shall do all of the following: [¶] (1) Designate the . . . land or other property to be

section, which applies in the context of a "*party demanding an inspection.*" (§ 2031, subd. (c).) Neither he nor respondent demanded an inspection. As we have indicated heretofore, no discovery under this section ever occurred.

In sum, in these circumstances, nothing in section 2031 or in the Discovery Act prevents a party from consulting with its own witnesses or inspecting a premises without notifying the opposing party, where it has been given informal permission to do so by the premises owner.[6]

C. Appellant was not denied due process.

Having determined respondent's conduct was lawful and did not violate the Discovery Act, we conclude appellant was not denied due process by respondent's failure to advise him that it was inspecting the floor or having an expert review testing results on that floor model. Appellant had every right to demand an inspection of the premises, to conduct his own discovery, and to discover results of tests performed by respondents.

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inspected . . . . [¶] (2) Specify a reasonable time for the inspection that is at least 30 days after service of the demand, . . ."

Section 2031 subdivision (d) provides: "The party demanding an inspection shall serve a copy of the inspection demand on the party to whom it is directed and on all other parties who have appeared in the action."

6 Appellant's reliance upon *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 Cal.App.3d 840 is misplaced. In that case the trial court ordered the defendant manufacturer in a product liability action to permit the plaintiff's representatives to conduct informal interviews with the defendant manufacturer's employees during normal working hours and not under oath. "[W]e find in the Discovery Act no authority for the requirement that [defendant] give claimants access, during normal working hours, to its employees for the purpose of informal interviews. A party to litigation is entitled to unimpeded access to persons who may have relevant information, and may if necessary have court orders to forestall interference with such access. But these discovery orders go farther, requiring [defendant] not only to permit claimants to interview its employees within its plant during working hours but also to 'advise and request' that the employees cooperate with claimants." (*Id.* at p. 849.)

The case clearly holds a party may not be compelled to allow "informal interviews" of its employees by the opposing party in the circumstances presented. It does not support appellant's claim that a party may not conduct an informal investigation or interview with its own employees or with the employees of another where the employer willingly gives its permission.

That he failed to timely invoke the discovery procedures available to him does not transform respondent's lawful conduct into a violation of appellant's right to due process.

CONCLUSION

The judgment is affirmed. Respondents shall recover their costs in connection with this appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.